United States Court of Appeals

for the Second Circuit

APPELLANT'S REPLY BRIEF

74-1550

United States Court of Appeals

FOR THE SECOND CIRCUIT

Docket No. 74-1550

UNITED STATES OF AMERICA,

Appellee,

—against—

JOSEPH DiNAPOLI, et al.,

Appellant.

REPLY BRIEF FOR APPELLANT JOSEPH DiNAPOLI

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In The

UNITED STATES COURT OF APPEALS

For The

SECOND CIRCUIT

No 74-1550

UNITED STATES OF AMERICA,

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vs.

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The facts

In an apparent effort to obscure the paucity of evidence connecting appellant Joseph DiNapoli with the narcotics conspiracy alleged in the indictment, the Government has garnished its brief with hyperbole and outright invention. This court is told, for example, that "appellants Inglese and Joseph DiNapoli directed the operations of the conspiracy from headquarters in Bronx County. Each combined with a common importer source, co-conspirator Vincent Papa, and each controlled the mixing, storage, and distribution of kilogram quantities. . . ." (G.B.6).

There is neither evidence nor inference to support these wild assertions; they are not even kin to facts.

No witness ever saw Joseph DiNapoli near any narcotics, nor present when a narcotics transaction was discussed. The only evidence connecting him at all with a narcotics conspiracy was hearsay and not even the hearsay suggested that DiNapoli "directed the operations of" or "controlled the mixing, storage, and distribution of" anything. The hearsay evidence against DiNapoli consisted of Pannirello's testimony that Pugliese told him Dilacio "was going to pick up from Joseph DiNapoli" (14:2158); Pugliese's instruction to Dilacio to get two kilos from DiNapoli (14:2166); Dilacio's statement to Pannirello that "Joe" said "nothing was happening right now" and that "Joe just kept putting him off" (14:2184-86); a statement by Pugliese that he and DiNapoli were "partners" (11:1457); a contradictory statement by Pugliese that DiNapoli and a man named Vinnie were partners in drugs (14:2217); and a statement by Dilacio that DiNapoli was Mamone's partner (10:1461). This evidence falls far short of justifying the Government's assertions.

The Government further claims that "Inglese and DiNapoli combined with a common importer source, co-conspirator Vincent Papa," and that "Carmine Tramunti

provided essential financing for this conspiracy" (G.B.6).[1] Yet the only evidence of an illicit relationship between DiNapoli and Papa, much less a relationship of importer-wholesaler, was the million dollar seizure and Pugliese's statement to Pannirello that DiNapoli "was partners" with a man named Vinnie (14:1227). The connection of Tramunti to Papa and DiNapoli, moreover, is nothing short of ludicrous: DiNapoli's brother, Vincent DiNapoli, who was not even named as a co-conspirator and against whom there wasn't a shred of evidence, once accompanied Vincent Papa to a nightclub (Tr. 386-388), and appeared in his brother's home on Bronxdale Avenue following Joseph's arrest. As if a brother had no right to visit another brother, or to show interest or concern following the brother's arrest, the Government incredibly asserts, "it is doubtful that the jury missed the significance of the fact that the night DiNapoli and Vincent Papa were arrested leaving the house at 1908 Bronxdale Avenue with almost $1 million in cash in a suitcase, Carmine Tramunti's close associate Vincent DiNapoli was inside the house." (G.B.40, emph. supp).

Sufficiency

a. The conspiracy

The Government is plainly in error in suggesting it need establish only "a likelihood of an illicit association between the declarant and the defendant . . ." in order to warrant a disregard of the hearsay rule. United States v. Ragland, 375 F. 2d 471, 477 (2d Cir. 1967), which the Government cites for this

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1 Similar statements are prominent throughout the Government's brief, e.g. "DiNapoli's narcotics operation: Frank Pugliese, Russo, Springer, Gamba and Mamone" (p.14); "Joseph DiNapoli's narcotics operations" (p.29); "Louis Inglese and Joseph DiNapoli presided over the day-to-day operations of the conspiracy, each supervising groups of people who distributed, mixed, transported, and sold narcotics" (p.39).

proposition (G.B.48) stands for no such thing. In context it is clear that the court in Ragland, in referring to an "illicit association" meant a "conspiracy, agency, or concert of action," Id. at 476, which must be proved before hearsay can be relied upon. As United States v. Geaney, 417 F. 2d 1116, 1120 (2d Cir. 1969) makes clear, the prosecution must prove "participation in the conspiracy. . . by a fair preponderance of the evidence independent of the hearsay utterances." While even this test may be somewhat vague, it seems the same as the civil standard, i.e. the balance of probabilities. Furthermore, as DiNapoli noted in his main brief (p.29), the Supreme Court recently delivered a dictum that the test of admissibility is even higher, i.e. "enough to take the question to the jury." United States v. Nixon, 42 L.W. 5237, 5243, n. 14 (July 24, 1974). While it seems clear that the Government here plainly failed to meet either the Geaney or the Nixon test, appellant urges adoption of the latter. As the court noted in Geaney, such a high standard "would not make the receipt of [hearsay] valueless to the prosecution. Although proof aliunde may suffice for submission to the jury, the jury might not be convinced by it and the utterances might tip the scale." 417 F. 2d at 1119-20.

In any event, the Government's proof falls well below that required by Geaney. The Government points to four items of evidence which it claims establishes DiNapoli's participation in the conspiracy aliunde the hearsay (G.B.49):

1. Pugliese, who was Pannirello's partner in narcotics, once took Pannirello with him to DiNapoli's house, where Pugliese, for no explained reason, gave DiNapoli eight to ten thousand dollars in cash (14:2131-32). Relying upon United States v. Mallah, Dkt. No. 74-1327 (2d Cir. September 23, 1974), Slip op. at 5478, the Government claims this was substantial evidence of

DiNapoli's membership in the conspiracy because Pugliese, at the time he delivered the money, was engaged in narcotics activities. In Mallah, however, the payment of large sums of money, proven to have come from a narcotics transaction, was connected with several incriminating conversations which established that the purpose of the payment was to share profits from narcotics activities. Indeed, one of those incriminating conversations with the defendant occurred in the presence of a pile of packages of white powder, at which time Mallah said, "Are you going to have enough money for this?" Id. at 5478. Here, there is no suggestion whatever that the money was a share in a narcotics operation. On the contrary, it was the Government's claim in another indictment, to which DiNapoli plead guilty, that DiNapoli, during the period in question, was engaged in the shylocking business on a large scale (30:4123-26, 45:4118-25). It is sheer speculation to surmise that the payment of eight to ten thousand dollars was a sharing of narcotics proceeds rather than payment of a debt or delivery of money for some other purpose.

2. DiNapcli visited the Beach Rose Social Club and was photographed standing outside the club with Tutino. Since there was no evidence that the Club was anything other than its name implies, DiNapoli's mere presence there is of no weight.

3. Pugliese and Mamone visited DiNapoli, at some unspecified time, in DiNapoli's Bronxdale Avenue home (Tr. 3267). Mere association, however, is not evidence of a criminal conspiracy. United States v. Di Re, 159 F. 2d 818 (2d Cir. 1947), affd., 332 U.S. 581 (1948); United States v. Gonzales, 362 F. Supp. 415 (SDNY 1973).

4. The "most compelling item of non-hearsay," says the Government (G.B.50), was DiNapoli's arrest, in February 1972, in possession of nearly a million

dollars. Yet this money not only never was connected to the conspiracy proved below, it has never been connected with drugs. Precisely because the money cannot be traced to or otherwise connected to any specific crime or conspiracy, the Government apparently intends to throw it into a number of indictments. In United States v. Papa et al, 74 Cr. 251, pending in the Southern District, a new panel of defendants, not named as co-conspirators in the present indictment, are confronted with the million dollars as an alleged overt act.

It cannot be denied that the million dollar seizure is probative of DiNapoli's criminal activity of some kind, somewhere, at some time. But to consider it as "compelling evidence" of his membership in the conspiracy below is tantamount to concluding that it is compelling evidence of his participation in any and all acquisitive conspiracies of whatever kind or description might be conjured up against him. The Geaney requirements therefore become meaningless.

The four items of evidence relied upon by the Government can be sifted, shuffled and combined in any manner, yet there is still insufficient non-hearsay evidence to establish the probability of DiNapoli's membership in this conspiracy. The evidence would without doubt be insufficient to support DiNapoli's arrest on the charges below. A fortiori it doesn't warrant his conviction on hearsay. Cf. United States v. Freeman, 2d Cir. June 7, 1974 (Slip op. #1050).

b. The substantive count

The Government's response to DiNapoli's claim that the evidence, including hearsay, was insufficient proof of the substantive count (possession of two

kilograms of heroin in December, 1971) is to label it "frivolous" and to rely on United States v. Annunziato, 293 F. 2d 373 (2d Cir. 1961). Such reliance, however, misses the point. Assuming arguendo the admissibility and the relevance of the evidence in support of count 21 (Dilacio told Pannirello that DiNapoli "was going to give him a kilo" for $22,000 (14:2175); Dilacio said he was going to pick up the kilo and take it to Gamba, the stash (14:2175); sometime thereafter, Pannirello picked up two packages from Gamba, said to be a kilo (14:2177)), there is no proof beyond reasonable doubt that DiNapoli actually delivered the kilo.[2]

A statement by one out-of-court declarant that another person is going to do something is inherently unreliable. As with traditional hearsay (e.g. an account of a past event), the value of the evidence rests upon the out of court declarant's perception, memory and sincerity, and on the meaning of the words. See generally, McCormick, Evidence § 295 (2d ed. 1972). The trier of fact is denied access to the basis of the speaker's claimed belief that the proclaimed plan or design was agreed to, is serious and will be carried out. Moreover, the possibility of unforeseen events intervening to thwart the plan is present in this kind of evidence, and must be considered in assessing its reliability. As a result, even those courts which admit statements of design to prove the declarant acted in accordance with the plan do not permit such statements as evidence that one other than the declarant (here, DiNapoli) also acted pursuant to the plan. Id. at p. 699. Manifestly, this evidence is not sufficiently reliable, in and of itself, to warrant conviction beyond reasonable doubt. Cf. United States v. Puco, 476 F. 2d 1099 (2d Cir. 1973).

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2 There was no evidence of any kind that DiNapoli had possessed two kilos, as charged in the indictment.

When considered with other evidence offered by the Government, the weakness of the proof is plain. Dilacio never said he got the kilo from DiNapoli; Gamba was used as a stash by Pugliese before this particular transaction (14:2175-76) and the kilo could therefore have come from inventory. Nobody ever paid DiNapoli for the kilo; the pickup could have occurred months after the statement of plan (18:2568), some time after it became clear that no drugs could be obtained from DiNapoli (18:2569-70. 14:2183). There is considerable basis in the Government's own evidence, therefore, to doubt that the plan, if it existed, was ever carried out. A judgment of acquittal should have been directed.

The money was illegally seized

a. The arrest was illegal

Assuming arguendo that the agents had good ground to suspect Vincent Papa of being a major narcotics violator, it violates common sense for the Government to assert that the agents therefore had "ample reason to believe" that the house in which DiNapoli (whom they didn't even know) lived "was being used in connection with the sale and distribution of narcotics" (G.B.65) or that "a major narcotics transaction was about to take place" (Ibid.). There was virtually nothing except Papa's reputation to warrant even suspicion "that a transfer of narcotics was taking place within their sight" (G.B.67). United States v. Chaplin, 427 F. 2d 14 (2d Cir. 1970), upon which reliance is placed, is clearly distinguishable. There, agents observed a series of clandestine meetings between defendant and other narcotics suspects, including the transfer of money followed by a bulge in defendant's coat. Incriminating conversations were even overheard. There were none here, and nothing in Papa or DiNapoli's

behavior was clandestine or secretive. Similarly, in United States v. Wabnik, 444 F. 2d 203 (2d Cir. 1971), the transfer of stolen property observed by the officers occurred under circumstances making "it difficult to imagine an innocent explanation for the activity" Id. at 205. Here, DiNapoli could have been about to embark on a trip, taking some records to his lawyer or any number of things innocent people do with suitcases. To hold that the presence of Papa created probable cause that Papa's companion was then and there engaged in criminal activity would be ludicrous were it not so frightening an assault on freedom. Fortunately, the Supreme Court long ago labelled such guilt by association "farfetched" even where, as there, the defendant was in an automobile, in the company of another who had rendevouzed for the known, specific purpose of committing a crime. "Presumptions of guilt are not lightly to be indulged from mere meetings." United States v. Di Re, 332 U.S. 581, 593 (1948). Accord, United States v. Gonzales, 362 F. Supp. 415 (SDNY 1973); Sibron v. New York, 392 U.S. 40 (1968).

b. The search, in any event, was illegal

If the agents had possessed probable cause to believe, as they say they did at least suspect, that DiNapoli's suitcase contained narcotics, they would of course have been justified in arresting DiNapoli and searching his suitcase. Appellant's claim, which the Government seems to misunderstand, is that the search cannot be justified as incidental to an arrest. Cases like Carroll v. United States, 267 U.S. 132 (1925), where there was probable cause to believe the car carried contraband, are irrelevant on this issue. Assuming no Carroll grounds for the search, and assuming arguendo a lawful arrest (concededly an unlikely assumption on these facts), the search of the suitcase was unreasonable.

Cases which uphold an incidental search of the person, e.g. United States v. Robinson, 414 U.S. 218 (1973); Gustafson v. Florida, 414 U.S. 260 (1973), are not in point and United States v. Riggs, 474 F. 2d 699 (2d Cir. 1973), is distinguishable. There, the court upheld as a protective measure the search of a camera case near defendant's feet. Here, the suitcase in the back of Papa's car was not within "grabbing distance," because both DiNapoli and Papa were in handcuffs almost immediately, before the suitcase was removed from the car, and were nowhere near it when it was searched. Chimel v. California, 395 U.S. 752 (1969) therefore commands exclusion, if the basis for the search is its being incidental to the arrest.

The relevance of the million dollars

In support of its claim that the seizure of the million dollars was admissible, the Government urges that Papa, DiNapoli's companion, was the source of all the narcotics involved in the conspiracy (G.B.55). The evidence supports no such claim. Even if it did, however, the evidence of the million dollars had only the most peripheral and speculative relationship to the conspiracy.

The Government's argument that the money is analoguous to the possession of special tools or implements needed for a crime (G.B.55n.) is inapt. First, while money may be needed to deal in narcotics, there is nothing special or unique about it -- any money will do. Second, possession of implements or tools uniquely suited to the crime has significant probative value only if closely related in time to the commission of the crime. Cf. 1 Wigmore, Evidence § 88, p. 516 (3d ed. 1940). Here, the temporal connection was tenuous and

remote, being two or three months after DiNapoli was said to be about to sell a kilo for $22,000.[3]

The Government's claim that some of the money found on February 3, 1972, was "directly traceable to narcotics transactions proved at trial" (G.B.55) is preposterous. The only money DiNapoli was shown at trial to have received was eight to ten thousand dollars, some six weeks before, and that money was not shown to have been part of a narcotics transaction.

The Government's heavy reliance upon United States v. Jackskion, 102 F. 2d 683, 684 (2d Cir. 1939), is misplaced. That case merely upheld the admissibility of "the sudden acquisition of wealth," Id. at 684, and is in no way inconsistent with Williams v. United States, 168 U.S. 382 (1897), or the position urged by appellant. The Government has cited no case in which evidence of the possession of money was either as remote to issues on trial or as prejudicial as the million dollars here admitted.

Conclusion

The judgment below should be reversed.

Respectfully submitted,

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3 Contrary to the Government's claims (G.B.55), there was no testimony by Dawson that Pugliese paid DiNapoli hundreds of thousands of dollars.

UNITED STATES COURT OF APPEALS
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CERTIFICATE OF SERVICE

I hereby certify that on October 16, 1974, I served two copies of Appellant DiNapoli's reply brief on the United States by mailing same, first class postage prepaid, to Paul Curran, United States Attorney, Southern District of New York, Federal Courthouse, Foley Square, New York, New York.

Steven B Dunn

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